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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,)	Criminal Case No. 07CR3209-JLS
)	
11 Plaintiff,	)	DATE: January 11, 2008
	)	TIME: 1:30 P.m.
12 v.)	
)	
13 CARLOS ESTRADA-JIMENEZ,)	
)	
14	)	GOVERNMENT'S RESPONSE AND
	)	OPPOSITION TO DEFENDANT'S
15	)	MOTIONS:
)	
16 Defendant.	)	(1) TO COMPEL DISCOVERY
	)	(2) TO DISMISS INDICTMENT
17	)	DUE TO MISINSTRUCTION
	)	(3) TO DISMISS INDICTMENT FOR
18	)	FAILURE TO ALLEGE ELEMENTS
	)	(4) TO STRIKE SURPLUSSAGE
19	)	(5) FOR GRAND JURY TRANSCRIPTS
	)	(6) TO SUPPRESS STATEMENTS
20	)	(7) FOR LEAVE TO FILE FURTHER
	)	MOTIONS
21)	
	)	TOGETHER WITH STATEMENT OF FACTS,
22	)	MEMORANDUM OF POINTS AND
	)	AUTHORITIES AND GOVERNMENT'S
23	)	MOTIONS FOR RECIPROCAL DISCOVERY
)	

24
25 The United States of America, by its counsel, Karen P. Hewitt,
26 United States Attorney, and Paul S. Cook, Assistant United States
27 Attorney, hereby responds to and opposes Defendants' above-captioned
28 Motions. This response and opposition is based upon the files and

1 records of the case, together with the attached statement of facts and
2 memorandum of points and authorities. The Government also hereby
3 files its motion for reciprocal discovery.

4 I

STATEMENT OF FACTS

5 On Friday, August 24, 2007, at 10:30 a.m., USBP Agents responded
6 to a radio call that two people were seen headed north in an area
7 approximately 100 yards north of the U.S./Mexico border, 5 miles east
8 of San Ysidro Port of Entry. Agents found the Defendant and the other
9 person hiding amongst some parked trucks. Agents questioned the
10 Defendant and the other alien, both of whom admitted to illegally
11 entering the United States from Mexico without valid immigration
12 documents. The Defendant admitted that he was a citizen and national
13 of Mexico. He was taken into custody and processed at the Border
14 Patrol station where he was advised of his immigration administrative
15 rights.

16 A subsequent record check revealed that Defendant had a criminal
17 history and several prior deportations/removals from the United
18 States. At 2:32 p.m., Defendant was advised of his right of Consular
19 Notification and declined to have the Mexican Consul notified. At
20 2:35 p.m., Defendant was advised that his administrative rights were
21 no longer applicable and he was advised of his Miranda rights in
22 Spanish. The Defendant indicated he understood his rights, agreed to
23 speak to the Agents without an attorney present, and signed a waiver
24 to that effect. In a video recorded interview Defendant again
25 admitted that he was a citizen of Mexico who had been previously
26 deported and had no permission to be in the United States. He also
27 admitted that he was trying to go to Los Angeles, California.

1 Defendant was ordered deported from the United States on March
2 25, 1997. He has been removed several times from the United States,
3 the last one being on April 19, 2001 at Calexico, California.

4 II
5 **THE GOVERNMENT HAS AND WILL CONTINUE TO COMPLY WITH**
6 **ITS DISCOVERY OBLIGATIONS**

7 The United States is aware of its discovery obligations, and will
8 continue to comply with its obligations under Brady v. Maryland, 373
9 U.S. 83 (1963), the Jencks Act (18 U.S.C. §3500) and Rule 16 of the
10 Federal Rules of Criminal Procedure. and will continue to comply with
11 all discovery rules. The United States has provided Defendants with
12 58 pages of discovery including: the arrest reports, the Defendant's
13 criminal history; the report of the Defendant's statement made during
14 a consensual, custodial interview by law enforcement officers; the
15 Waiver form signed by Defendant; a CD of Defendant's confession;
16 immigration documents relevant to his deportations. Regarding the
17 specific requests made by the Defendant, the United States responds
18 as follows:

19 1. Rule 404(b) Evidence

20 The United States will provide Defendant with notice of its
21 intent to present evidence pursuant to Rule 404(b) no later than three
22 weeks before trial or as otherwise ordered by the Court. The
23 Government intends to use Defendant's prior Southern District of
24 California 8 U.S.C. § 1326 conviction in 1988 as 404(b) evidence.

25 2. Evidence Seized and Preservation

26 The Government will preserve all evidence seized from the
27 Defendant, who in turn may make an appointment, at a mutually
28 convenient time, to inspect the evidence.

3. Tangible Objects

The Government will provide copies of or an opportunity to inspect all documents, including the A-File, and tangible things material to the defense, intended for use in the Government's case in chief, or seized from Defendant.

4. Expert Witnesses

The Government will notify Defendant of its expert witnesses, and will comply with Fed. R. Crim. P. 16(a)(1)(G).

5. List and Addresses of Witnesses

The Government has provided Defendant with the investigative reports relating to this crime. These reports include the names of the law enforcement personnel, eye witnesses and other people interviewed as part of the follow-up investigation. The Government will provide Defendant with a list of all witnesses which it intends to call in its case-in-chief at the time the Government's trial memorandum is filed, although delivery of such list is not required. See United States v. Dischner, 960 F.2d 870 (9th Cir. 1992); United States v. Culter, 806 F.2d 933, 936 (9th Cir. 1986); United States v. Mills, 810 F.2d 907, 910 (9th Cir. 1987). Defendant, however, is not entitled to the production of addresses or phone numbers of possible Government witnesses. See United States v. Hicks, 103 F.3d 837, 841 (9th Cir. 1996) ("A district court that orders the Government and the defendant to exchange witness lists and summaries of anticipated witness testimony in advance of trial has exceeded its authority under Rule 16 of the Federal Rules of Criminal Procedure and has committed error."); United States v. Thompson, 493 F.2d 305, 309 (9th Cir. 1977).

1 Federal Rule of Criminal Procedure 16 does not require the
2 government (or the defense) to disclose the names and addresses of
3 witnesses pretrial. Indeed, the Advisory Committee Notes reflect that
4 the Committee rejected a proposal that would have required the parties
5 to exchange the names and addresses of their witnesses three days
6 before trial:

7 The House version of the bill provides that each party, the
8 government and the defendant, may discover the names and
9 addresses of the other party's witnesses 3 days before
10 trial. The Senate version of the bill eliminates these
11 provisions, thereby making the names and addresses of a
12 party's witnesses nondiscoverable. The Senate version also
13 makes a conforming change in Rule 16(d)(1). The Conference
14 adopts the Senate version.

15 A majority of the Conferees believe it is not in the
16 interest of the effective administration of criminal
17 justice to require that the government or the defendant be
18 forced to reveal the names and addresses of its witnesses
19 before trial. Discouragement of witnesses and improper
20 contact directed at influencing their testimony, were
21 deemed paramount concerns in the formulation of this
22 policy.

23 United States v. Napue, 834 F.2d 1311, 1317-19 (7th Cir. 1987)
24 (quoting Rule 16 advisory committee notes) (emphasis added).

25 The Government will not provide Defendants with names and
26 addresses of witnesses it does not intend to call.

27 7. Informant Information

28 The Government is unaware of an informants in this case.

8. Grand Jury Transcripts

Without further specificity as to the basis for this claim,
defendant fall far short of making the required showing for disclosure
of grand jury transcripts.

In seeking grand jury transcripts under Rule 6(e), defendant must
show that the material they seek is "needed to avoid a possible

1 injustice in another judicial proceeding, that the need to disclose
 2 is greater than the need for continued secrecy, and that their request
 3 is structured to cover only material so needed." Douglas Oil Company
 4 v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979). The showing of
 5 need for the transcripts must be made "with particularity" so that
 6 "the secrecy of the proceedings [may] be lifted discretely and
 7 limitedly." Id. at 221, citing United States v. Proctor & Gamble Co.,
 8 356 U.S. 677, 683 (1958). See also United States v. Malquist, 791
 9 F.2d 1399, 1402 (9th Cir.), cert. denied, 479 U.S.954 (1986).

10 Defendant's justification for requesting transcripts of all grand
 11 jury testimony is entirely devoid of particularity. Production of
 12 transcripts of testimony of any witnesses who may have appeared before
 13 the grand jury should be governed by the Jencks Act. Accordingly,
 14 this motion should be denied.

15 **III**
 16 **MOTION TO DISMISS INDICTMENT**

17 A. THE GRAND JURY INSTRUCTIONS WERE NOT FAULTY, AND
 18 THE INDICTMENT SHOULD NOT BE DISMISSED
 19 1. Introduction

20 Defendant makes contentions relating to two separate instructions
 21 given to the grand jury during its impanelment by District Judge Larry
 22 A. Burns on January 10, 2007. The first pertains to a "wisdom of the
 23 criminal laws" instruction, and the second pertains to presentation
 24 of exculpatory evidence by the Assistant United States Attorney.^{1/}
 25 Although recognizing that the Ninth Circuit in United States v.
 26 Navarro-Vargas, 408 F.3d 1184 (9th Cir. 2005) (en banc) generally

27 ^{1/} As Defendant acknowledges, this issue has been raised and
 28 rejected by most of the District Court Judges.

1 found the two grand jury instructions constitutional, Defendant here
2 contends Judge Burns went beyond the text of the approved
3 instructions, and by so doing rendered them improper to the point that
4 the Indictment should be dismissed.

5 To the extent that Defendant urges this Court to dismiss the
6 Indictment by exercising its supervisory powers over grand jury
7 procedures, this is a practice that the Supreme Court discourages, as
8 Defendant acknowledges, citing United States v. Williams, 504 U.S. 36,
9 50 (1992) ("Given the grand jury's operational separateness from its
10 constituting court, it should come as no surprise that we have been
11 reluctant to invoke the judicial supervisory power as a basis for
12 prescribing modes of grand jury procedure."). [Id.] United States v.
13 Isgro, 974 F.2d 1091 at 1094 (9th Cir. 1992) reiterated:

14 [A] district court may draw on its supervisory powers
15 to dismiss an indictment. The supervisory powers doctrine
16 "is premised on the inherent ability of the federal courts
17 to formulate procedural rules not specifically required by
18 the Constitution or Congress to supervise the
19 administration of justice." Before it may invoke this
power, a court must first find that the defendant is
actually prejudiced by the misconduct. Absent such
prejudice-that is, absent "'grave' doubt that the decision
to indict was free from the substantial influence of [the
misconduct]"-a dismissal is not warranted.

20 (citation omitted, emphasis added). Concerning the second attacked
21 instruction, in an attempt to dodge the holding in Williams, Defendant
22 appears to base his contentions on the Constitution as a reason to
23 dismiss the Indictment. "A grand jury so badly misguided is no grand
24 jury at all under the Fifth Amendment". Concerning that kind of a
25 contention Isgro stated:

26 [A] court may dismiss an indictment if it perceives
27 constitutional error that interferes with the grand jury's
independence and the integrity of the grand jury

proceeding. "Constitutional error is found where the 'structural protections of the grand jury have been so compromised as to render the proceedings fundamentally unfair, allowing the presumption of prejudice' to the defendant." Constitutional error may also be found "if [the] defendant can show a history of prosecutorial misconduct that is so systematic and pervasive that it affects the fundamental fairness of the proceeding or if the independence of the grand jury is substantially infringed."

974 F.2d at 1094 (citation omitted).^{2/}

The portions of the two relevant instructions approved in Navarro-Vargas were:

You cannot judge the wisdom of the criminal laws enacted by Congress, that is, whether or not there should or should not be a federal law designating certain activity as criminal. That is to be determined by Congress and not by you.

408 F.3d at 1187, 1202.

The United States Attorney and his Assistant United States Attorneys will provide you with important service in helping you to find your way when confronted with complex legal problems. It is entirely proper that you should receive this assistance. If past experience is any indication of what to expect in the future, then you can expect candor, honesty, and good faith in matters presented by the government attorneys.

408 F.3d at 1187, 1206.

Concerning the "wisdom of the criminal laws" instruction, the court stated it was constitutional because, among other things, "[i]f a grand jury can sit in judgment of wisdom of the policy behind a law, then the power to return a no bill in such cases is the clearest form

^{2/} In Isgro the defendants choose the abrogation of constitutional rights route when asserting that prosecutors have a duty to present exculpatory evidence to grand juries. They did not prevail. 974 F.2d at 1096 ("we find that there was no abrogation of constitutional rights sufficient to support the dismissal of the indictment." (relying on Williams)).

1 of 'jury nullification.'"^{3/} 408 F.3d at 1203 (footnote omitted).
 2 "Furthermore, the grand jury has few tools for informing itself of the
 3 policy or legal justification for the law; it receives no briefs or
 4 arguments from the parties. The grand jury has little but its own
 5 visceral reaction on which to judge the 'wisdom of the law.'" Id.

6 Concerning the "United States Attorney and his Assistant United
 7 States Attorneys" instruction, the court stated:

8 We also reject this final contention and hold that
 9 although this passage may include unnecessary language, it
 10 does not violate the Constitution. The "candor, honesty,
 11 and good faith" language, when read in the context of the
 12 instructions as a whole, does not violate the
 13 constitutional relationship between the prosecutor and
 grand jury. . . . The instructions balance the praise for
 the government's attorney by informing the grand jurors
 that some have criticized the grand jury as a "mere rubber
 stamp" to the prosecution and reminding them that the grand
 jury is "independent of the United States Attorney[.]"

14 408 F.3d at 1207. Id. "The phrase is not vouching for the
 15 prosecutor, but is closer to advising the grand jury of the
 16 presumption of regularity and good faith that the branches of
 17 government ordinarily afford each other." Id.

18 2. The Expanded "Wisdom of the Criminal Laws"
 19 Instruction Was Proper

20 Concerning whether the new grand jurors should concern themselves
 21 with the wisdom of the criminal laws enacted by Congress, Judge Burns'
 22 full instruction stated:

23 _____
 24 ^{3/} The Court acknowledged that as a matter of fact jury
 25 nullification does take place, and there is no way to control it. "We
 26 recognize and do not discount that some grand jurors might in fact
 27 vote to return a no bill because they regard the law as unwise at best
 or even unconstitutional. For all the reasons we have discussed,
 there is no post hoc remedy for that; the grand jury's motives are
 not open to examination." 408 F.3d at 1204 (emphasis in original).

1 You understood from the questions and answers that a
2 couple of people were excused, I think three in this case,
3 because they could not adhere to the principle that I'm
4 about to tell you.

5 But it's not for you to judge the wisdom of the
6 criminal laws enacted by Congress; that is, whether or not
7 there should be a federal law or should not be a federal
8 law designating certain activity is criminal is not up to
9 you. That's a judgment that Congress makes.

10 And if you disagree with the judgment made by
11 congress, then your option is not to say "Well I'm going to
12 vote against indicting even though I think that the
13 evidence is sufficient" or "I'm going to vote in favor of
14 even though the evidence may be insufficient." Instead,
15 your obligation is to contact your congressman or advocate
16 for a change in the laws, but not to bring your personal
17 definition of what the law ought to be and try to impose
18 that through applying it in a grand jury setting.

19 Defendant acknowledges that in line with Navarro-Vargas, "Judge
20 Burns instructed the grand jurors that they were forbidden 'from
21 judg[ing] the wisdom of the criminal laws enacted by Congress; that
22 is, whether or not there should be a federal law or should not be a
23 federal law designating certain activity [as] criminal is not up to
24 you.'" Defendant notes, however, that "[t]he instructions go beyond
25 that, however, and tell the grand jurors that, should 'you disagree
26 with that judgment made by Congress, then your option is not to say
27 'Well, I'm going to vote against indicting even though I think that
28 the evidence is sufficient' or 'I'm going to vote in favor of even
though the evidence maybe insufficient.'" Defendant contends that
this addition to the approved instruction, "flatly bars the grand jury
from declining to indict because the grand jurors disagree with a
proposed prosecution." Defendant further contends that the flat
prohibition was preemptively reinforced by Judge Burns when he
"referred to an instance in the grand juror selection process in which

1 he excused three potential jurors," which resulted in his "not only
2 instruct[ing] the grand jurors on his view of their discretion; [but
3 his] enforc[ing] that view on pain of being excused from service as
4 a grand juror."

5 In concocting his theory of why Judge Burns erred, Defendant
6 posits that the expanded instruction renders irrelevant the debate
7 about what the word "should" means. Defendant contends, "the
8 instruction flatly bars the grand jury from declining to indict
9 because they disagree with a proposed prosecution." This argument
10 conflates two of the holdings in Navarro-Vargas in the hope they will
11 blend into one. They do not.

12 Navarro-Vargas does permit flatly barring the grand jury from
13 disagreeing with the wisdom of the criminal laws. The statement,
14 "[y]ou cannot judge the wisdom of the criminal laws enacted by
15 Congress," (emphasis added) authorized by Navarro-Vargas, 408 F.3d at
16 1187, 1202, is not an expression of discretion. Jury nullification
17 is forbidden although acknowledged as a sub rosa fact in grand jury
18 proceedings. 408 F.3d at 1204. In this respect Judge Burns was
19 absolutely within his rights, and within the law, when he excused the
20 three prospective grand jurors because of their expressed inability
21 to apply the laws passed by Congress. Similarly, it was proper for
22 him to remind the impaneled grand jurors that they could not question
23 the wisdom of the laws. As we will establish, this reminder did not
24 pressure the grand jurors to give up their discretion not to return
25 an indictment. Judge Burns' words cannot be parsed to say that they
26 flatly barred the grand jury from declining to indict because the
27 grand jurors disagree with a proposed prosecution, because they do not

1 say that. That aspect of a grand jury's discretionary power (i.e.
2 disagreement with the prosecution) was dealt with in Navarro-Vargas
3 in its discussion of another instruction wherein the term "should" was
4 germane.^{4/} 408 F.3d at 1204-06 ("'Should' Indict if Probable Cause Is
5 Found"). This other instruction bestows discretion on the grand jury
6 not to indict.^{5/} In finding this instruction constitutional, the
7 court stated in words that ring true here, "It is the grand jury's
8 position in the constitutional scheme that gives it its independence,
9 not any instructions that a court might offer." 408 F.3d at 1206.

11 ^{4/} That instruction is not at issue here. It read as follows:

12 [Y]our task is to determine whether the government's
13 evidence as presented to you is sufficient to cause you to
14 conclude that there is probable cause to believe that the
15 accused is guilty of the offense charged. To put it
16 another way, you should vote to indict where the evidence
presented to you is sufficiently strong to warrant a
reasonable person's believing that the accused is probably
guilty of the offense with which the accused is charged.

17 408 F.3d at 1187.

18 ^{5/} The court upheld the instruction stating:

19 This instruction does not violate the grand jury's
20 independence. The language of the model charge does not
21 state that the jury "must" or "shall" indict, but merely
22 that it "should" indict if it finds probable cause. As a
matter of pure semantics, it does not "eliminate discretion
on the part of the grand jurors," leaving room for the
grand jury to dismiss even if it finds probable cause.

23 408 F.3d at 1205 (confirming holding in United States v. Marcucci,
24 299 F.3d 1156, 1159 (9th Cir. 2002) (per curiam)). "In this respect,
25 the grand jury has even greater powers of nonprosecution than the
26 executive because there is, literally, no check on a grand jury's
27 decision not to return an indictment. 408 F.3d at 1206.

1 The other instruction was also given by Judge Burns in his own
2 fashion as follows:

3 The function of the grand jury, in federal court at
4 least, is to determine probable cause. That's the simple
5 formulation that I mentioned to a number of you during the
6 jury selection process. Probable cause is just an analysis
7 of whether a crime was committed and there's a reasonable
8 basis to believe that and whether a certain person is
9 associated with the commission of that crime, committed it
10 or helped commit it.

11 If the answer is yes, then as grand jurors your
12 function is to find that the probable cause is there, that
13 the case has been substantiated, and it should move
14 forward. If conscientiously, after listening to the
15 evidence, you say "No, I can't form a reasonable belief has
16 anything to do with it, then your obligation, of course,
17 would be to decline to indict, to turn the case away and
18 not have it go forward.

19 Appendix 1 pp. 3-4.

20 Probable cause means that you have an honestly held
21 conscientious belief and that the belief is reasonable that
22 a federal crime was committed and that the person to be
23 indicted was somehow associated with the commission of that
24 crime. Either they committed it themselves or they helped
25 someone commit it or they were part of a conspiracy, an
26 illegal agreement, to commit that crime.

27 To put it another way, you should vote to indict when
28 the evidence presented to you is sufficiently strong to
warrant a reasonable person to believe that the accused is
probably guilty of the offense which is proposed.

While the new grand jurors were told by Judge Burns that they
could not question the wisdom of the criminal laws per Navarro-Vargas,
they were also told by Judge Burns they had the discretion not to
return an indictment per Navarro-Vargas. Further, if a potential
grand juror could not be dissuaded from questioning the wisdom of the
criminal laws, that grand juror should be dismissed as a potential
jury nullification advocate. See Merced v. McGrath, 426 F.3d 1076,
1079-80 (9th Cir. 2005). Thus, there was no error requiring dismissal

1 of this Indictment or any other indictment by this Court exercising
2 its supervisory powers.

3 Further, a reading of the dialogues between Judge Burns and the
4 three excused jurors reflects a measured, thoughtful, almost mutual
5 decision, that those three individuals should not serve on the grand
6 jury because of their views. Judge Burns' reference back to those
7 three colloquies cannot be construed as pressuring the impaneled grand
8 jurors, but merely bespeaks a reminder to the grand jury of their
9 duties.

10 Finally, even if there was an error, Defendant has not
11 demonstrated he was actually prejudiced thereby, a burden he has to
12 bear. "Absent such prejudice--that is, absent 'grave' doubt that the
13 decision to indict was free from the substantial influence of [the
14 misconduct]--a dismissal is not warranted." Isgro, 974 F.2d at 1094.

15 3. The Addition to the "United States Attorney
16 and his Assistant United States Attorneys" Instruction
Did Not Violate the Constitution

17 Concerning the new grand jurors' relationship to the United
18 States Attorney and the Assistant U.S. Attorneys, Judge Burns
19 variously stated:

20 [T]here's a close association between the grand jury and
21 the U.S. Attorney's Office.

22 You'll work closely with the U.S. Attorney's
Office in your investigation of cases.

23 [I]n my experience here in the over 20 years in this court,
24 that kind of tension does not exist on a regular basis,
that I can recall, between the U.S. Attorney and the grand
25 juries. They generally work together.

26 Now, again, this emphasizes the difference between the
function of the grand jury and the trial jury. You're all
27 about probable cause. If you think that there's evidence
out there that might cause you to say "well, I don't think

1 probable cause exists," then it's incumbent upon you to
2 hear that evidence as well. As I told you, in most
3 instances, the U.S. Attorneys are duty-bound to present
evidence that cuts against what they may be asking you to
do if they're aware of that evidence.^{6/}

4
5 As a practical matter, you will work closely with
6 government lawyers. The U.S. Attorney and the Assistant
7 U.S. Attorneys will provide you with important services and
help you find your way when you're confronted with complex
legal matters. It's entirely proper that you should
receive the assistance from the government lawyers.

8
9 But at the end of the day, the decision about whether
10 a case goes forward and an indictment should be returned is
11 yours and yours alone. If past experience is any
12 indication of what to expect in the future, then you can
expect that the U.S. Attorneys that will appear in front of
you will be candid, they'll be honest, that they'll act in
good faith in all matters presented to you.

13 Defendant contends that by making the statement, "the U.S.
14 Attorneys are duty-bound to present evidence that cuts against what
15 they may be asking you to do if they're aware of that evidence," the
16 Judge was assuring the grand jurors that prosecutors would present to
17 them evidence that tended to undercut probable cause." Defendant
18 then ties this statement to the later instruction which "advis[ed] the
19 grand jurors that they 'can expect that the U.S. Attorneys that will
20 appear in front of [them] will be candid, they'll be honest, and . .
21 . they'll act in good faith in all matters presented to you.'" From
22 this lash-up Defendant contends:

23 ^{6/} Just prior to this instruction, Judge Burns had informed the
24 grand jurors that:

25 [T]hese proceedings tend to be one-sided necessarily. . .
26 Because it's not a full-blown trial, you're likely in most
27 cases not to hear the other side of the story, if there is
28 another side to the story.

1 These instructions create a presumption that, in cases
2 where the prosecutor does not present exculpatory evidence,
3 no exculpatory evidence exists. A grand juror's reasoning,
 in a case in which no exculpatory evidence was presented,
 would proceed along these lines:

4 (1) I have to consider evidence that undercuts
5 probable cause.

6 (2) The candid, honest, duty-bound prosecutor would,
7 in good faith, have presented any such evidence to me,
 if it existed.

8 (3) Because no such evidence was presented to me, I
 may conclude that there is none.

9 Even if some exculpatory evidence were presented, a grand juror
10 would necessarily presume that the evidence presented represents
11 the universe of all available exculpatory evidence; if there was
 more, the duty-bound prosecutor would have presented it.

12 The instructions therefore discourage investigation--
13 if exculpatory evidence were out there, the prosecutor
14 would present it, so investigation is a waste of time --
15 and provide additional support to every probable cause
16 determination: i.e., this case may be weak, but I know
 that there is nothing on the other side of the equation
 because it was not presented. A grand jury so badly
 misguided is no grand jury at all under the Fifth
 Amendment.^{2/}

17 Frankly, Judge Burns' statement that "the U.S. Attorneys are
18 duty-bound to present evidence that cuts against what they may be
19 asking you to do if they're aware of that evidence," is directly
20 contradicted by United States v. Williams, 504 U.S. 36, 51-53 (1992)
21 ("If the grand jury has no obligation to consider all 'substantial
22 exculpatory' evidence, we do not understand how the prosecutor can be

23 ^{2/} The term "presumption" is too strong a word in this setting.
24 The term "inference" is more appropriate. See McClellan v. Moran, 963
25 F.2d 1306 (9th Cir. 1992) which states there are (1) permissive
26 inferences; (2) mandatory rebuttable presumptions; and (3) mandatory
27 conclusive presumptions, and explains the difference between the
28 three. 963 F.2d at 1308-09 (discussing Francis v. Franklin, 471 U.S.
 314 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979); and Ulster
 County Court v. Allen, 442 U.S. 140, 157 & n. 16 (1979)). See also
 United States v. Warren, 25 F.3d 890, 897 (9th Cir. 1994).

1 said to have a binding obligation to present it."^{8/} (emphasis
 2 added)). See also, United States v. Haynes, 216 F.3d 789, 798 (9th
 3 Cir. 2000) ("Finally, their challenge to the government's failure to
 4 introduce evidence impugning Fairbanks's credibility lacks merit
 5 because prosecutors have no obligation to disclose 'substantial
 6 exculpatory evidence' to a grand jury." (citing Williams) (emphasis
 7 added)).

8 However, the analysis does not stop there. Prior to assuming his
 9 judicial duties, Judge Burns was a member of the United States
 10 Attorney's Office, and made appearances in front of the federal grand
 11 jury.^{9/} As such he was undoubtedly aware of the provisions in the
 12 United States Attorneys' Manual ("USAM").^{10/} Specifically, it appears
 13 he is aware of USAM Section 9-11.233 thereof which reads:

14
 15 ^{8/} Note that in Williams the Court established:

16 Respondent does not contend that the Fifth Amendment
 17 itself obliges the prosecutor to disclose substantial
 18 exculpatory evidence in his possession to the grand jury.
 19 Instead, building on our statement that the federal courts
 20 "may, within limits, formulate procedural rules not
 specifically required by the Constitution or the Congress,"
 he argues that imposition of the Tenth Circuit's disclosure
 rule is supported by the courts' "supervisory power."

21 504 U.S. at 45 (citation omitted). The Court concluded, "we conclude
 22 that courts have no authority to prescribe such a duty [to present
 exculpatory evidence] pursuant to their inherent supervisory authority
 over their own proceedings." 504 U.S. at 55. See also,
 23 United States v. Haynes, 216 F.3d 789, 797-98 (9th Cir. 2000).
 However, the Ninth Circuit in Isgro used Williams' holding that the
 24 supervisory powers would not be invoked to ward off an attack on grand
 jury procedures couched in constitutional terms. 974 F.2d at 1096.

25 ^{9/} He recalled those days when instructing the new grand
 26 jurors.

27 ^{10/} The USAM is available on-line at
 www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html.

In United States v. Williams, 112 S.Ct. 1735 (1992), the Supreme Court held that the Federal courts' supervisory powers over the grand jury did not include the power to make a rule allowing the dismissal of an otherwise valid indictment where the prosecutor failed to introduce substantial exculpatory evidence to a grand jury. It is the policy of the Department of Justice, however, that when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence that directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person. While a failure to follow the Department's policy should not result in dismissal of an indictment, appellate courts may refer violations of the policy to the Office of Professional Responsibility for review.

(Emphasis added.)^{11/} This policy was reconfirmed in USAM 9-5.001, Policy Regarding Disclosure of Exculpatory and Impeachment Information, Paragraph "A," "this policy does not alter or supersede the policy that requires prosecutors to disclose 'substantial evidence that directly negates the guilt of a subject of the investigation' to the grand jury before seeking an indictment, see USAM § 9-11.233 ."

(Emphasis added.)^{12/}

^{11/} See www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/11mcrm.htm. Even if Judge Burns did not know of this provision in the USAM while he was a member of the United States Attorney's Office, because of the accessibility of the USAM on the internet, as the District Judge overseeing the grand jury he certainly could determine the required duties of the United States Attorneys appearing before the grand jury from that source.

^{12/} Similarly, this new section does not bestow any procedural or substantive rights on defendants.

Under this policy, the government's disclosure will exceed its constitutional obligations. This expanded disclosure policy, however, does not create a general right of discovery in criminal cases. Nor does it provide defendants with any additional rights or remedies.

(continued...)

1 The facts that Judge Burns' statement contradicts Williams, but
2 is in line with self-imposed guidelines for United States Attorneys,
3 does not create the constitutional crisis proposed by Defendant. No
4 improper presumption/inference was created when Judge Burns reiterated
5 what he knew to be a self-imposed duty to the new grand jurors.
6 Simply stated, in the vast majority of the cases the reason the
7 prosecutor does not present "substantial" exculpatory evidence, is
8 because no "substantial" exculpatory evidence exists.^{13/} If it does
9 exist, as mandated by the USAM, the evidence should be presented to
10 the grand jury by the Assistant U.S. Attorney upon pain of possibly
11 having his or her career destroyed by an Office of Professional
12 Responsibility investigation. Even if there is some nefarious slant
13 to the grand jury proceedings when the prosecutor does not present any
14 "substantial" exculpatory evidence, because there is none, the
15 negative inference created thereby in the minds of the grand jurors
16 is legitimate. In cases such as Defendant's, the Government has no
17 "substantial" exculpatory evidence generated from its investigation

18
19
20
21 ^{12/}(...continued)
22 USAM 9-5.001, ¶ "E".

23 See www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm.

24 ^{13/} Recall Judge Burns also told the grand jurors that:

25 [T]hese proceedings tend to be one-sided necessarily. . .
26 Because it's not a full-blown trial, you're likely in most
27 cases not to hear the other side of the story, if there is
28 another side to the story.

1 or from submissions tendered by the defendant.^{14/} There is nothing
2 wrong in this scenario with a grand juror inferring from this state-
3 of-affairs that there is no "substantial" exculpatory evidence, or
4 even if some exculpatory evidence were presented, the evidence
5 presented represents the universe of all available exculpatory
6 evidence.

7 Further, just as the instruction language regarding the United
8 States Attorney attacked in Navarro-Vargas was found to be
9 "unnecessary language [which] does not violate the Constitution," 408
10 F.3d at 1207, so too the "duty-bound" statement was unnecessary when
11 charging the grand jury concerning its relationship with the United
12 States Attorney and her Assistant U.S. Attorneys, and does not violate
13 the Constitution. In United States v. Isgro, 974 F.2d 1091 (9th Cir.
14 1992), the Ninth Circuit while reviewing Williams established that
15 there is nothing in the Constitution which requires a prosecutor to
16 give the person under investigation the right to present anything to
17 the grand jury (including his or her testimony or other exculpatory
18 evidence), and the absence of that information does not require
19 dismissal of the indictment. 974 F.2d at 1096 ("Williams clearly
20 rejects the idea that there exists a right to such 'fair' or
21 'objective' grand jury deliberations."). That the USAM imposes a duty
22 on United States Attorneys to present "substantial" exculpatory

23 ^{14/} Realistically, given "that the grand jury sits not to
24 determine guilt or innocence, but to assess whether there is adequate
25 basis for bringing a criminal charge [i.e. only finding probable
26 cause]," Williams, 504 U.S. at 51 (citing United States v. Calandra,
27 414 U.S. 338, 343-44 (1974)), no competent defense attorney is going
28 to preview the defendant's defense story prior to trial assuming one
will be presented to a fact-finder. Therefore, defense submissions
to the grand jury will be few and far between.

1 evidence to the grand jury is irrelevant since by its own terms the
2 USAM excludes defendants from reaping any benefits from the self-
3 imposed policy.^{15/} Therefore, while the "duty-bound" statement was an
4 interesting tidbit of information, it was unnecessary in terms of
5 advising the grand jurors of their rights and responsibilities, and
6 does not cast an unconstitutional pall upon the instructions which
7 requires dismissal of the indictment in this case or any case. The
8 grand jurors were repeatedly instructed by Judge Burns that, in
9 essence, the United States Attorneys are "good guys," which was
10 authorized by Navarro-Vargas. 408 F.3d at 1206-07 ("laudatory
11 comments . . . not vouching for the prosecutor"). But he also
12 repeatedly "remind[ed] the grand jury that it stands between the
13 government and the accused and is independent," which was also
14 required by Navarro-Vargas. 408 F.3d at 1207. In this context the
15 unnecessary "duty-bound" statement does not mean the instructions were
16 constitutionally defective requiring dismissal of this indictment or
17 any indictment.

18 The "duty bound" statement constitutional contentions raised by
19 Defendant do not indicate that the "'structural protections of the
20 grand jury have been so compromised as to render the proceedings
21 fundamentally unfair, allowing the presumption of prejudice' to the
22 defendant," and "[the] defendant can[not] show a history of
23 prosecutorial misconduct that is so systematic and pervasive that it
24

25 ^{15/} The apparent irony is that although an Assistant U.S.
26 Attorney will not lose a case for failure to present exculpatory
27 information to a grand jury per Williams, he or she could lose his or
her job with the United States Attorney's Office for such a failure
per the USAM.

1 affects the fundamental fairness of the proceeding or if the
2 independence of the grand jury is substantially infringed." Isgro,
3 974 F.2d at 1094 (citation omitted). Therefore, this Indictment, nor
4 any other indictment, need not be dismissed.

5
6 **IV**
THE INDICTMENT IS SUFFICIENT

7 Defendant argues that the Indictment is defective and must be
8 dismissed in that it fails to allege: he knew he was in the United
9 States; he failed to undergo inspection; and that his entry was
10 voluntary. The Indictment sufficiently states the necessary elements
11 of a Section 1326 "found in" offense, as those elements have been
12 identified by the Ninth Circuit. Accordingly, Defendant's motion
13 should be denied. The Supreme Court has noted that a charging
14 document is generally sufficient if it sets forth the offense in the
15 words of the statute itself, as long as "those words of themselves
16 fully, directly, and expressly, without any uncertainty or ambiguity,
17 set forth all the elements necessary to constitute the offence
18 intended to be punished." Hamling v. United States, 418 U.S. 87, 117
19 (1974); see also United States v. Musacchio, 968 F.2d 782, 787 (9th
20 Cir.1991) (indictment that tracks the statute itself is generally
21 sufficient). Therefore, alleging that the defendant is a deported
22 alien who was found in the United States without consent is plainly
23 sufficient.

24 The Ninth Circuit has rejected Defendant's argument that the
25 Court should dismiss the indictment for failure to charge all of the
26 necessary components of an entry, e.g., either (1) inspection and
27 admission by an immigration officer, or (2) actual and intentional

1 evasion of inspection at the inspection point nearest to where he was
2 apprehended. Rivera-Sillas, 417 F.3d at 1019-20. ("The Government
3 need not plead and prove entry in order to charge or convict an alien
4 with a § 1326 'found in' crime."). See also United States v. Parga-
5 Rosas, 238 F.3d 1209, 1213 (9th Cir. 2001) ("[W]e have never suggested
6 that the crime of "entry" must be charged in order to charge the crime
7 of being "found in.").

8 The Ninth Circuit has considered and rejected Defendant's exact
9 claim in United States v. Rivera-Sillas, 417 F.3d 1014, 1018 (9th Cir.
10 2005) (explaining that the "found in" clause of § 1326 "does not
11 require the indictment to specifically state that the defendant alien
12 entered the United States."). In that case, the Ninth Circuit
13 specifically held that the Government need not allege the Defendant
14 voluntarily entered the United States in a "found in" indictment. Id.
15 at 1018-19. Rivera-Sillas reaffirms prior Ninth Circuit holdings on
16 this issue. United States v. Rodriguez-Rodriguez, 364 F.3d 1142, 1145
17 (9th Cir. 2004)(citing United States v. Parga-Rosas, 238 F.3d 1209
18 (9th Cir. 2001)). In Rodriguez-Rodriguez, the Ninth Circuit
19 reaffirmed that the Government need not allege a voluntary entry for
20 a "found in" indictment under §1326. Id. In doing so, the Court
21 directly rejected Defendant's claim that Parga-Rosas had been
22 implicitly overruled by the Ninth Circuit's decision in United States
23 v. Buckland, 289 F.3d 558 (9th Cir.2002) (en banc). Rodriguez-
24 Rodriguez, 364 F.3d at 1146 ("Buckland in no way overrules Parga-
25 Rosas.") Thus, under Parga-Rosas, Rodriguez-Rodriguez, and Rivera-
26 Sillas, the indictment in this case sufficiently states the elements
27 of the offense. Defendant also contends that the Court should dismiss
28

1 the indictment for failure to charge the required mens rea element
2 that Defendant knew he was in the United States. This argument has
3 also been rejected by the Ninth Circuit in Rivera-Sillas.

4 A "found in" offense under 8 U.S.C. § 1326 is a general intent
5 crime. Rivera-Sillas, 417 F.3d at 1020. An indictment that alleges
6 that the defendant is "a deported alien subsequently found in the
7 United States without permission suffices [to allege general
8 intent]." Id. (citations omitted).

9 Defendant's reliance on United States v. Salazar-Gonzalez, 458
10 F.3d (9th Cir. 2007) is misplaced, as that case dealt not with the
11 propriety of the indictment, but with jury instructions on the issues
12 of voluntariness and knowledge in a 1326 case. In fact the court
13 there cites with approval its holdings in the Rivera-Sillas case.

14 Defendant also argues that the indictment is defective in that
15 it does not allege a deportation date or a temporal relationship to
16 his removal. Quite to the contrary, the Indictment alleges that the
17 defendant "was removed from the United States subsequent to April 2,
18 1997." This date is subsequent to his felony convictions and prior
19 to his "found in" date of August 24, 2007, as charged in the
20 Indictment. This complies with the requirements of United States v.
21 Covian-Sandoval, 462 F.3d 1090, 1096-98 (9th Cir.2006), [holding that
22 the fact of a prior conviction need not have been submitted to the
23 jury, but the date of a prior removal (necessary to determine whether
24 the removal had followed the conviction in time) must be admitted by
25 the defendant or found by a jury]. See U.S. v. Salazar-Lopez, 506 F.3d
26 748 (9th Cir. 2007) (fact that defendant had been removed after his
27 conviction, should have been alleged in the indictment and proved to
28

1 the jury). Indeed, the Ninth Circuit recently held that a district
2 court did not err by permitting the government to introduce evidence
3 that defendant had been deported on two separate occasions where the
4 evidence of each deportation was dissimilar, saying: "The government
5 was entitled to introduce evidence of both deportations to hedge the
6 risk that the jury may reject the offered proof of one deportation,
7 but not the other." United States v. Martinez-Rodriguez, 472 F.3d 1087
8 (9th Cir. 2007).

9 Defendant's motion to dismiss should be denied.

10 V

11 **DEFENDANT'S STATEMENTS ARE ADMISSIBLE**

12 Defendant moves to suppress his post-arrest statement on the
13 grounds of invalid Miranda waiver and lack of voluntariness. The
14 Government submits the defendant's signed Advice and Waiver of Rights
15 form rebuts these allegations. The Government acknowledges that the
16 Court must make a voluntariness determination pursuant to 18 U.S.C.
17 §3501.

18 Under Ninth Circuit and Southern District precedent, as well as
19 a Southern District Local Rule, a defendant is entitled to an
20 evidentiary hearing on a motion to suppress only when the Defendant
21 adduces specific facts sufficient to require the granting of
22 Defendant's motion. United States v. Batiste, 868 F.2d 1089, 1093
23 (9th Cir. 1989) (where "defendant, in his motion to suppress, failed
24 to dispute any material fact in the government's proffer, . . . the
25 district court was not required to hold an evidentiary hearing");
26 United States v. Moran-Garcia, 783 F. Supp. 1266, 1274 (S.D. Cal.
27 1991) (boilerplate motion containing indefinite and unsworn
28

1 allegations was insufficient to require evidentiary hearing on
2 defendant's motion to suppress statements); Crim. L.R. 47.1.

3 Requiring a declaration from a defendant in no way compromises
4 defendant's constitutional rights, as declarations in support of a
5 motion to suppress cannot be used by the government at trial over a
6 defendant's objection. Batiste, 868 F.2d at 1092 (proper to require
7 declaration in support of Fourth Amendment motion to suppress);
8 Moran-Garcia, 783 F. Supp. at 1271-74 (extending Batiste to Fifth
9 Amendment motion to suppress). Furthermore, a defendant can not
10 reasonably claim that he has less information than the government, and
11 therefore should be excused from providing proof to support a motion.
12 Batiste, 868 F.2d at 1092.

13 In this case, Defendant has failed to provide a declaration
14 alleging specific and material facts. Thus, this Court would be
15 within its discretion to deny defendant's suppression motion based
16 upon the written advisal and waiver of rights form. Defendant's
17 motions to suppress his statements should be denied without a hearing.

18 VI

19 LEAVE TO FILE FURTHER MOTIONS

20 The Government has no objection to this motion.

21 VI

22 THE GOVERNMENT'S MOTION FOR RECIPROCAL
DISCOVERY SHOULD BE GRANTED

23 The discovery provided to Defendants, at their request, includes
24 documents and objects which are discoverable under Rule 16(a)(1)(E).
25 Consequently, the Government is entitled to discover from the
26 defendant any books, papers, documents, data, photographs, tangible
27 objects, buildings or places, or copies or portions of any of these

1 items that are in Defendant's possession, custody or control and which
2 Defendant intends to use in the Defendant's case-in-chief. See Rule
3 16(b)(1)(A), Fed. R. Crim. P..

4 Fed. R. Crim. P. 26.2 requires the production of prior statements
5 of all witnesses, except Defendants'. The new rule thus provides for
6 the reciprocal production of Jencks statements. The time frame
7 established by the rule requires the statement to be provided after
8 the witness has testified, as in the Jencks Act. Therefore, the
9 United States hereby requests that Defendants be ordered to supply all
10 prior statements of defense witnesses by a reasonable date before
11 trial to be set by the Court. This order should include any form
12 these statements are memorialized in, including but not limited to,
13 tape recordings, handwritten or typed notes or reports.

14 **VII**
15 **CONCLUSION**

16 For the above stated reasons, the Government respectfully
17 requests that the Defendant's motions be denied, except where
18 unopposed, and the Government's motion for reciprocal discovery be
19 granted.

20 Date: January 4, 2008.

21 Respectfully submitted,

22 KAREN P. HEWITT
23 United States Attorney

24 s/Paul S. Cook
25 PAUL S. COOK
26 Assistant United States Attorney
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Case No. 07cr3209-JLS
)
Plaintiff,)
)
v.)
) CERTIFICATE OF SERVICE
CARLOS ESTRADA-JIMENEZ,)
)
Defendant.)
_____)

IT IS HEREBY CERTIFIED THAT:

I, Paul S. Cook, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of Government's Response and Opposition to Defendant's Motions on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

1. Robert H. Rexrode, III

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 4, 2008.

s/Paul S. Cook

PAUL S. COOK